Child A (a minor suing through his mother and litigation representative, Cheah Chai Yuen) & Ors v Pengarah Hospital Tuanku Ja'Afar, Seremban & Ors

HIGH COURT (SEREMBAN) — CIVIL SUIT NO NA21NCVC-11–10 OF 2020
AZIZUL AZMI ADNAN J
30 JUNE 2022

Civil Procedure — Action — Government proceedings — Action against Government — Court ordered defendant Government to bear thrown away costs — Whether court's order that defendants' counsel personally liable to pay costs was correct — Whether order for costs ought to be set aside — Interpretation of s 31(6) of Government Proceedings Act 1956 — Government Proceedings Act 1956 s 31(6)

Civil Procedure — Costs — Order for costs — Court directed parties to amend plaintiffs' table of experts' issues — Defendants prepared separate table of experts' issues — Whether defendants failed to comply with direction of court — Whether order for costs ought to be granted

Civil Procedure — Discovery — Relevancy of documents — Application for discovery of privileges and credentialing documents of doctors — Whether documents relevant — Whether application for discovery ought to be allowed

The first plaintiff was a minor who suffered cerebral palsy. The second plaintiff and the third plaintiff were the first plaintiff's father and mother respectively. The plaintiffs had sued certain members of staff of Hospital Tuanku Ja'afar in Seremban for medical negligence related to the circumstances of the first plaintiff's birth. As was common in a medical negligence action, the plaintiffs intended to adduce expert testimony, hence, the court ordered the parties to file the expert report. The plaintiffs had filed their expert report, but the defendants had failed to do the same within the stipulated time. Nevertheless, although delayed, the defendants eventually filed the said report. Subsequently, pursuant to O 40A r 5(3) of the Rules of Court 2012, the court directed the parties to prepare the table of expert's issues. The plaintiffs had prepared the plaintiffs' draft table of expert's issues. After reviewing the said draft table, the court ordered the parties to amend the format of the table. In contravention to the court's order, instead of commenting on and amending the plaintiff's table of expert's issues, the counsel for the defendants prepared a separate table setting out the defendants' expert issues. Consequently, the court directed the

defendants to bear the costs of RM500 as costs thrown away ('the order for costs'). The defendants then filed an application to set aside the order for costs by relying on s 31(6) of the Government Proceedings Act 1956 ('the GPA'). In relation to the defendant's expert report, the plaintiffs had filed a discovery application to obtain the privileges and credentialing documents for the doctors involved. In opposing this application, the defendants stated that only the fifth and the ninth defendants were involved in the lower segment caesarean section procedure undertaken on the third plaintiff, as such, the other doctors were not relevant and hence need not be disclosed to the plaintiffs ('the defendants' submission').

Held:

(1) The course of action taken by the counsel for the defendants who had prepared a separate table of expert's issues was otiose, and quite contrary to logic. The function of the table of experts' issues was so that the views of the experts could be easily compared, and so that the proceedings could be directed to those areas where the experts were in disagreement. It ought to have been plain to the counsel for the defendants that having two tables would have undermined the whole *raison d'etre* for the comparison table in the first place. It would be impossible for the opinions of the experts to be compared in summary form unless they were set out in the same table (see para 17).

(2) At the case management conference, the counsel for the defendants was unable to provide reasons why the plaintiffs' draft experts' table was unacceptable to the defendants and why they had produced their own table instead of commenting and suggesting amendments to the plaintiffs' draft table. The previous directions were clear, that there could only be one table of experts' issues. Due to the defendants' failure to comply with the directions of court, the court directed that they bear costs of RM500 as costs thrown away. One of the reasons for the case management conference was for the comparison table to be finalised to the extent possible between counsel, before scheduling a meeting between the experts but this objective could not be achieved due to the failure of the defendants' counsel to comply with the direction of the court. Moreover, given that trial was imminent, it may not have been possible to schedule a meeting of the experts before trial. In effect, the substantial portion of the work done by the solicitors of the plaintiffs had been in vain (see paras 18–19).

(3) Section 31(6) of the GPA provided that 'A legal officer shall not be personally liable for costs in any proceedings under this Act'. The court had considered the GPA as a whole and opined that the expression 'any proceedings under this Act' in s 31(6) of the GPA was not meant to refer to proceedings that were instituted pursuant to the provisions of the

GPA, but rather to civil proceedings to which the government was a party. For this reason, the court discharged that portion of the order that required the costs to be borne by counsel for the defendants personally. However, the court did not discharge the order of costs in its entirety, on account of not just the delay on the part of the defendants to comply with the directions of court that bordered on the contumelious, but also on account of the abject failure on the part of the counsel for the defendants to appreciate that, having two comparison tables defeated the very purpose of a comparison table (see paras 26 & 29–31).

(4) The defendants' submission was contrary to the principles of discovery, where a plaintiff's case must be assumed to be true for the purposes of determining the relevance of a document sought to be discovered. The plaintiffs had named all the defendants because they had been involved, in some respect or another, in attending to the third plaintiff when she had gone to the hospital to deliver her baby. This was ascertained by the medical records available to the plaintiffs prior to the filing of the action. Therefore, by applying the test in the case of *Yekambaran s/o Marimuthu v Malayawata Steel Bhd* [1993] MLJU 96, the privileging and credentialing documents sought in respect of all the defendant doctors were relevant. It stands to reason that the credentials of the doctors attending the first and third plaintiffs were relevant, as this went directly to the issue of whether they were appropriately qualified. Whether or not all the doctors had been actually involved in attending to the third plaintiff and the first plaintiff (after his birth) was a matter for determination at trial (see paras 37 & 41).

(5) The court directed that the privileging and credentialing documents be provided no later than the end of the week in question, failing which judgment would be entered against the defendants. The court was of the view that an unless order was appropriate in the circumstances, given the imminence of the trial dates, and also taking into account the conduct of the case by counsel for the defendants up to that point. Had trial not proceeded on the scheduled dates, the court's next available dates would be more than a year hence, which would have been an unacceptable delay. The court was mindful that it was the role of the court not only to deliver justice in disputes between parties, but also to do so in an expeditious and economical way (see para 42).

[Bahasa Malaysia summary

Plaintif pertama adalah kanak-kanak bawah umur yang mengalami cerebral palsy. Plaintif kedua dan plaintif ketiga masing-masing adalah bapa dan ibu kepada plaintif pertama. Plaintif-plaintif telah menyaman beberapa kakitangan Hospital Tuanku Ja'afar di Seremban kerana kecuaian perubatan berkaitan keadaan kelahiran plaintif pertama tersebut. Seperti biasa dalam tindakan kecuaian perubatan, plaintif-plaintif berhasrat untuk

mengemukakan keterangan pakar, justeru, mahkamah mengarahkan pihak-pihak untuk memfailkan laporan pakar. Plaintif-plaintif telah memfailkan laporan pakar mereka, tetapi defendan-defendan gagal melakukan perkara yang sama dalam masa yang ditetapkan. Namun begitu, walaupun tertangguh, defendan-defendan akhirnya memfailkan laporan tersebut. Selepas itu, berdasarkan A 40A k 5(3) Kaedah-Kaedah Mahkamah 2012, mahkamah mengarahkan pihak-pihak untuk menyediakan jadual isu-isu pakar. Plaintif-plaintif telah menyediakan draf jadual isu-isu pakar plaintif. Selepas meneliti draf jadual tersebut, mahkamah mengarahkan pihak-pihak meminda format jadual tersebut. Bercanggahan dengan perintah mahkamah yang mengarahkan pihak-pihak mengulas dan meminda jadual isu-isu pakar plaintif, peguam defendan-defendan menyediakan jadual berasingan yang menyatakan isu-isu pakar defendan-defendan. Akibatnya, mahkamah mengarahkan defendan-defendan menanggung kos sebanyak RM500 sebagai kos yang dibuang ('perintah untuk kos'). Defendan-defendan kemudiannya memfailkan permohonan untuk mengenepikan perintah untuk kos dengan bergantung kepada s 31(6) Akta Prosiding Kerajaan 1956 ('APK'). Berhubung dengan laporan pakar defendan-defendan, plaintif-plaintif telah memfailkan permohonan penzahiran untuk mendapatkan dokumen keistimewaan dan kelayakan untuk doktor-doktor yang terlibat. Dalam menentang permohonan ini, defendan-defendan menyatakan bahawa hanya defendan kelima dan kesembilan terlibat dalam prosedur pembedahan caesarean segmen bawah yang dijalankan ke atas plaintif ketiga, oleh itu, doktor-doktor lain tidak relevan dan oleh itu tidak perlu dizahirkan kepada plaintif-plaintif ('hujahan defendan-defendan').

Diputuskan:

(1) Tindakan yang diambil oleh peguam defendan-defendan yang telah menyediakan jadual berasingan isu-isu pakar adalah tidak masuk akal, dan agak bertentangan dengan logik. Fungsi jadual isu-isu pakar adalah supaya pandangan pakar-pakar dapat dibandingkan dengan mudah, dan supaya prosiding dapat diarahkan ke bahagian di mana pakar berselisih pendapat. Ia sepatutnya jelas kepada peguam defendan-defendan bahawa kewujudan dua jadual akan menjejaskan keseluruhan *raison d'etre* bagi jadual perbandingan itu sendiri. Adalah mustahil untuk membandingkan pendapat pakar-pakar dalam bentuk ringkasan melainkan ianya dinyatakan dalam jadual yang sama (lihat perenggan 17).

(2) Pada persidangan pengurusan kes, peguam defendan-defendan tidak dapat memberikan sebab mengapa draf jadual pakar plaintif-plaintif tidak dapat diterima oleh defendan-defendan dan mengapa mereka telah mengemukakan jadual mereka sendiri dan bukannya mengulas dan mencadangkan pindaan kepada draf jadual plaintif-plaintif. Arahan sebelumnya adalah jelas, bahawa hanya ada satu jadual isu-isu pakar.

Disebabkan kegagalan defendan-defendan mematuhi arahan mahkamah, mahkamah mengarahkan mereka menanggung kos RM500 sebagai kos yang dibuang. Salah satu tujuan persidangan pengurusan kes adalah untuk jadual perbandingan dimuktamadkan setakat yang boleh antara peguam sebelum menjadualkan mesyuarat antara pakar tetapi objektif ini tidak dapat dicapai kerana kegagalan peguam defendan-defendan mematuhi arahan mahkamah. Selain itu, memandangkan perbicaraan semakin hampir, tidak mungkin mesyuarat pakar-pakar boleh ditetapkan sebelum perbicaraan. Kesannya, sebahagian besar kerja yang dilakukan oleh peguamcara plaintif-plaintif telah menjadi sia-sia (lihat perenggan 18 & 19).

(3) Seksyen 31(6) APK memperuntukkan bahawa 'A legal officer shall not be personally liable for costs in any proceedings under this Act'. Mahkamah telah mempertimbangkan APK secara keseluruhan dan berpendapat bahawa ungkapan 'any proceedings under this Act' dalam s 31(6) APK tidak bermaksud untuk merujuk kepada prosiding yang telah dimulakan menurut peruntukan APK, tetapi sebaliknya merujuk kepada prosiding sivil yang melibatkan Kerajaan. Atas sebab ini, mahkamah mengenepikan bahagian perintah yang memerlukan kos ditanggung oleh peguam defendan-defendan secara peribadi. Walau bagaimanapun, mahkamah tidak mengenepikan perintah kos secara keseluruhannya, bukan sahaja atas sebab kelewatan pihak defendan-defendan untuk mematuhi arahan mahkamah yang mana ini sangat hampir kepada penghinaan, tetapi juga disebabkan oleh kegagalan yang teruk oleh peguam defendan-defendan untuk menghargai bahawa, kewujudan dua jadual perbandingan adalah bertentangan dengan tujuan jadual perbandingan itu sendiri (lihat perenggan 26 & 29–31).

(4) Hujahan defendan-defendan adalah bertentangan dengan prinsip penzahiran, di mana kes plaintif-plaintif mesti diandaikan benar untuk tujuan menentukan kaitan sesuatu dokumen yang ingin dizahirkan. Plaintif-plaintif telah menamakan semua defendan-defendan kerana mereka telah terlibat, dalam beberapa hal atau lain, dalam merawat plaintif ketiga apabila dia pergi ke hospital untuk melahirkan bayinya. Ini telah dipastikan oleh rekod perubatan yang tersedia kepada plaintif-plaintif sebelum pemfailan tindakan. Oleh itu, dengan menggunakan ujian dalam kes *Yekambaran s/o Marimuthu v Malayawata Steel Bhd* [1993] MLJU 96, dokumen keistimewaan dan kelayakan yang ingin dizahirkan berkenaan dengan semua doktor defendan-defendan adalah relevan. Adalah wajar bahawa kelayakan doktor-doktor yang merawat plaintif pertama dan ketiga adalah relevan, kerana ini mempengaruhi isu sama ada mereka layak dengan sewajarnya. Sama ada atau tidak semua doktor telah benar-benar terlibat dalam merawat plaintif ketiga dan plaintif pertama (selepas kelahirannya) adalah perkara untuk penentuan dalam perbicaraan (lihat perenggan 37 & 41).

(5) Mahkamah mengarahkan supaya dokumen keistimewaan dan kelayakan dikemukakan selewat-lewatnya pada penghujung minggu tersebut, jika gagal, penghakiman akan dimasukkan terhadap defendan-defendan. Mahkamah berpendapat bahawa 'unless order' adalah sesuai dalam keadaan kes ini, memandangkan tarikh perbicaraan semakin hampir, dan juga mengambil kira pengurusan kes oleh peguam defendan-defendan sehingga tahap itu. Sekiranya perbicaraan tidak diteruskan pada tarikh yang dijadualkan, tarikh sedia ada mahkamah yang seterusnya adalah lebih daripada setahun, yang akan menjadi kelewatan yang tidak boleh diterima. Mahkamah sedar bahawa ia adalah peranan mahkamah bukan sahaja untuk memberikan keadilan dalam pertikaian antara pihak-pihak, tetapi juga untuk melakukannya dengan cara yang cepat dan menjimatkan (lihat perenggan 42).]

Cases referred to

Manilal & Sons (Pte) Ltd v— Bhupendra KJ Shan (t/a JB International) [1990] 2 MLJ 282, HC (folld)
Yekambaran s/o Marimuthu v Malayawata Steel Bhd [1993] MLJU 96; [1994] 2 CLJ 581, HC (folld)

Legislation referred to

Government Proceedings Act 1956 s 31(1), (6)
Rules of Court 2012 O 40A, O 40A r 5(3)

Harmindar Singh Dhillon (with Sharannya Sundaramoorthy) (HS Dhillon & Co) for the plaintiffs.
Nurhafizza Azizan (with Uma Devi Balasubramaniam) (Senior Federal Counsel, Attorney General's Chambers) for the defendants.

Azizul Azmi Adnan J:

INTRODUCTION

[1] These grounds of judgment relate to:

(a) an order of costs in the amount of RM500 given by the court against the defendants for failure to comply with pre-trial directions; and

(b) an unless order made by the court for the discovery of certain documents in the possession of the defendants.

BACKGROUND FACTS

[2] The first plaintiff is a minor. He suffers from cerebral palsy. Through his mother and litigation representative, he sued certain members of staff of Hospital Tuanku Ja'afar in Seremban for medical negligence related to the

A circumstances of his birth. The second and third plaintiffs are the first plaintiff's father and mother respectively. It was the plaintiffs' case that the negligence on the part of the defendants had led to cerebral hypoxia and ultimately to the condition from which the first plaintiff suffers.

B **[3]** The suit was filed in October 2020.

[4] At a case management conference on 5 July 2021, trial was fixed for eight days in June 2022.

C THE ORDER OF COSTS

[5] In the course of case management conferences, the court was informed that the plaintiffs wished to adduce expert testimony, and for this purpose expert reports would be prepared. The court directed that the expert reports D comply with the requirements of O 40A of the Rules of Court 2012.

[6] At a case management conference held 12 July 2021, the court was informed that three of the plaintiffs' expert reports were ready. The court E directed that the three reports be emailed to the defendants' counsel no later than the following Wednesday. Counsel for the defendants informed the court and the plaintiffs' solicitors of the identity of the defendants' experts. The court was further informed that defendants' expert reports would be ready within two months. The court directed that these reports be filed no later than the next F case management conference date, which was fixed for 23 September 2021. The lawyers were informed by the court that further directions will be given regarding rebuttal reports to be prepared by the experts.

[7] The lawyers were also informed of the possibility that expert testimony G would be received simultaneously at trial, in a process commonly known as hot- tubbing. The expert witnesses would testify after the witnesses of fact have testified.

[8] At the 23 September 2021 case management conference, the court was H informed that the defendants' expert reports had yet to be filed, contrary to directions given on the last date. The court gave an unless order for such reports to be filed within a period of a further eight weeks. Despite the unless order, the defendants' expert reports were only provided on 24 January 2022, approximately two months after the extended deadline set by the court, and I four months after the original deadline.

[9] Before any deadlines are fixed for any matter in the course of case management conferences, it is customary that I ask the relevant party how long they require to attend to the matter. So it was in this case. The timelines were

not plucked from thin air, but determined after taking into account input from solicitors.

[10] In a case management conference on 8 March 2022, counsel for the plaintiff was directed to prepare a table of experts' issues, which was to be discussed the next case management conference three weeks later, on 29 March 2022.

[11] I pause the narrative here to observe that, by the end of March 2022, there would be little more than two months to trial. Even though there was ample time given for the preparation of the expert reports, it was only after an unless order was given that the defendants were able to deliver their expert reports.

[12] The table of experts' issues is a document that is intended to summarise the issues upon which the experts have opined. These issues are set out in tabular form, which enables a reader to quickly ascertain the areas in which the experts are in disagreement. The direction by the court to prepare the table of experts' issues was intended to facilitate a discussion between the experts prior to trial, and was given pursuant to O 40A r 5(3), which provides as follows:

> (3) The Court may direct that following a discussion between the experts, they shall prepare a statement for the Court showing—
>
> (a) the issues on which they agree; and
>
> (b) the issues on which they disagree and a summary of their reasons for disagreeing.

[13] Customarily, the court would use the table of experts' issues as a rubric when taking the expert witnesses through their testimonies at the hot-tubbing proceedings. A discussion with the experts is held on an issue by issue basis. At the end of the discussion for each issue, counsel for the parties would be given an opportunity to pose further questions to the experts in cross-examination.

[14] At the case management conference on 29 March 2022, the court reviewed the draft table of experts' issues and suggested amendments to its format. The court directed that the parties settle the table within three weeks. The court fixed a further case management for 27 April 2022.

[15] By this time, there would have been just enough time for the discussion between the experts, as the first day of trial was on 7 June 2022, leaving slightly more than one month to schedule and complete a discussion between the experts, bearing in mind that the experts were medical practitioners whose schedules could reasonably be expected to be very busy.

[16] At the case management conference on 27 April 2022, the court was informed that, instead of commenting on, and amending, the plaintiff's draft experts' table, counsel for the defendants had prepared a separate table setting out the defendants' experts' issues.

[17] The course of action taken by the counsel for the defendants was otiose, and quite contrary to logic. The function of the table of experts' issues was so that the views of the experts could be easily compared, and so that the proceedings could be directed to those areas where the experts are in disagreement. It ought to have been plain to the counsel for the defendants that having two tables would have undermined the whole *raison d'etre* for the comparison table in the first place. It would be impossible for the opinions of the experts to be compared in summary form, unless they were set out in the same table.

[18] At the case management conference, the counsel for the defendants was unable to provide reasons why the draft experts' table prepared by the solicitors for the plaintiffs was unacceptable to the defendants and why they had produced their own table instead of commenting and suggesting amendments to the plaintiffs' draft table. The previous directions were clear, that there could only be one table of experts' issues.

[19] As a consequence of the failure by the counsel for the defendants to comply with the directions of court, I directed that they bear costs of RM500 as costs thrown away. One of the reasons for the case management conference was for the comparison table to be finalised to the extent possible between counsel, before scheduling a meeting between the experts. Because the defendants' counsel had not complied with the direction of the court, this objective could not be achieved. More than just that, I considered that, given that trial was imminent, it may not have been possible to schedule a meeting of the experts before trial. In effect, the substantial portion of the work done by the solicitors of the plaintiffs had been in vain.

[20] As events transpired, trial had proceeded and the evidence of the gynaecology and obstetric experts was received without the use of the experts' summary table. No pre-trial discussion between the experts was held, which in my view, could have narrowed down the issues at trial.

[21] Dissatisfied with the order of costs, the defendant applied to me for the order to be set aside.

[22] At the final case management conference prior to trial held on 13 May 2022, the court was informed by Mr Harmindar, counsel for the plaintiffs, that the plaintiffs had no intention of enforcing the order of costs. Despite this, the

counsel for the defendants were adamant that the setting aside application be heard and disposed on its merits.

[23] Even before the setting aside application was heard, the defendants appealed against the order of costs.

THE SETTING ASIDE APPLICATION

[24] I heard the setting aside application on the first day of trial.

[25] I allowed the application in part only, in respect of the order for the costs to be borne by the counsel for the defendants personally.

[26] The attention of the court was drawn to s 31(6) of the Government Proceedings Act 1956, which reads as follows:

> (6) A legal officer shall not be personally liable for costs in any proceedings under this Act.

[27] The expression 'legal officer' includes an officer from the Federal Attorny General's Chambers.

[28] I observe that s 31(6) is somewhat unhappily worded. What is meant by 'any proceedings under this Act'? Would a suit in negligence to which the government is party — such as the present case — be considered to be proceedings under the Government Proceedings Act 1956? Surely, if parliament had meant s 31(6) to refer to any civil proceedings to which the government was a party, then Parliament would have said so. Indeed, in s 31(1), a similar formulation was used.

[29] However, having considered the Government Proceedings Act 1956 as a whole, I was of the view that this was the correct construction of s 31(6). The expression 'any proceedings under this Act' was not meant to refer to proceedings that were instituted pursuant to the provisions of the Government Proceedings Act 1956, but rather to civil proceedings to which the government was a party.

[30] For this reason, I discharged that portion of the order that required the costs to be borne by counsel for the defendants personally.

[31] I was, however, not minded to discharge the order of costs in its entirety, on account of not just the delay on the part of the defendants to comply with the directions of court that bordered on the contumelious, but also on account the abject failure on the part of the counsel for the defendants to appreciate

A that, having two comparison tables defeated the very purpose of a comparison table.

THE DISCOVERY APPLICATION

B **[32]** The defendants' expert report referred to privileges and credentialing documents for the doctors involved in the suit. This document is maintained by the hospital, and sets out the medical procedures that may be undertaken by a particular doctor. A doctor's privileges and credentials to undertake particular medical procedures are determined by reference to the experience that the C doctor has garnered in assisting in undertaking surgical procedures and in undertaking such procedures under supervision. The defendant's expert report was provided to the plaintiffs' solicitors on 24 January 2022.

D **[33]** In the meantime, the plaintiffs had made an application for discovery in encl 43, which was filed on 10 December 2021. At a case management conference before the registrar of the court held on 7 February 2022, the court was informed that the solicitors for the plaintiffs had requested the privileges and credentialing documents from counsel for the defendants. Their somewhat E startling response was that the defendants were willing to adduce the document at trial, but not beforehand for inclusion into the trial bundles. The counsel for the defendants made the point that the discovery application in encl 43 had made no specific mention of the privileges and credentialing documents. This was understandably so, because encl 43 had been filed before the defendants' F expert reports had been made available. It may be observed that, had the defendants complied with the earlier court direction for their expert reports to be provided by the end of November, then the discovery application could have taken into account the contents of the reports, and the privileges and credentialing documents could have been requested in encl 43. In effect, the G counsel for the defendants were relying on their own indolence to resist the pre-trial disclosure of the privileges and credentialing documents.

[34] The approach taken by counsel for the defendants forced the plaintiffs' hand. On 9 March 2022, the plaintiffs filed another discovery application, in H encl 61, to obtain the privileges and credentialing documents for the doctors involved. The court granted an extension of time until 25 March 2022 for defendants to file their affidavit in opposition. This deadline too came and passed. The affidavit in question was only filed on 1 April 2022.

I **[35]** This affidavit acknowledged that there were two doctors who were involved in the lower segment caesarean section procedure undertaken on the third plaintiff. These were the fifth and ninth defendants.

[36] The discovery application was heard and disposed of on 27 April 2022.

Counsel for the defendant argued the privileges and credentialing documents for the other doctors (other than the fifth and ninth defendants) were not relevant and hence need not be disclosed to the plaintiffs.

[37] In my judgment, this was contrary to the principles of discovery, where a plaintiff's case must be assumed to be true for the purposes of determining the relevance of a document sought to be discovered.

[38] In order to succeed in their application, the plaintiffs must establish the three essential elements identified by the Edgar Joseph Jr SCJ (delivering the judgment of the High Court) in *Yekambaran s/o Marimuthu v Malayawata Steel Bhd* [1993] MLJU 96; [1994] 2 CLJ 581:

> The essential elements for an order for discovery are threefold; namely, first, there must be a 'document', secondly, the document must be 'relevant' and thirdly, the document must be or have been in the 'possession, custody or power' of the party against whom the order for discovery is sought.

[39] Guidance as to whether a document sought is relevant is found in the following passage of the Singapore High Court case of *Manilal & Sons (Pte) Ltd V Bhupendra KJ Shan (t/a JB International)* [1990] 2 MLJ 282:

> Under a general order of court for discovery, a party is obliged to make discovery of all documents relevant to the matters in question in the action. What are the matters in question would depend on the pleadings. A document relates to the matter in question in the action if it contains information which may — not which must — either directly or indirectly enable the party requiring the discovery either to advance his own case or to damage the case of his adversary or which may fairly lead to a train of inquiry which may have either of those two consequences: see *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55 at p 62. Documents relate to matters in question in the action so long as they are likely to throw light on the case: see *Merchants' & Manufacturers' Insurance Co Ltd v Davies* [1938] 1 KB 196 at p 210.

[40] In examining the relevancy or materiality of the plaintiffs' application for discovery to a fact in issue, the plaintiffs' case must be assumed to be true: see *Yekambaran*'s case, op cit, where His Lordship cited with approval the following passage from *The Principles and Practice of Discovery* by Edward Bray:

> ... for the purpose of testing the materiality of the discovery to a particular issue ... it is the case of the party seeking the discovery that must be assumed to be true, and not that of the party from whom the discovery is sought.

[41] The plaintiffs had named all the defendants because they had been involved, in some respect or another, in attending to the third plaintiff when she had gone to hospital to deliver her baby. This was ascertained by the

A medical records available to the plaintiffs prior to the filing of the action. I was thus of the view that the privileging and credentialing documents sought in respect of all the defendant doctors were relevant, using the test in *Yekambaran*'s case. It stands to reason that the credentials of the doctors attending the first and third plaintiffs were relevant, as this went directly to the B issue of whether they were appropriately qualified. Whether or not all the doctors had been actually involved in attending to the third plaintiff and the first plaintiff (after his birth) was a matter for determination at trial.

C **[42]** The court directed that the privileging and credentialing documents be provided no later than the end of the week in question, failing which judgment would be entered against the defendants. I was of the view that an unless order was appropriate in the circumstances, given the imminence of the trial dates, and also taking into account the conduct of the case by counsel for the D defendants up to that point. Had trial not proceeded on the scheduled dates, the court's next available dates would be more than a year hence, which would have been an unacceptable delay. I was mindful that it is the role of the court not only to deliver justice in disputes between parties, but also to do so in an expeditious and economical way.

E

POST SCRIPT

[43] When I received the notice of appeal in this case, it was not immediately obvious to me from the notice of appeal what order or direction of court had F been made the subject matter of the defendants' appeal. It was only when clarification was sought from counsel that the court was told. Only then was it possible for these grounds to be prepared.

G **[44]** By the time of writing, trial had completed, and the privileges and credentialing documents had been duly provided for the purposes of trial. I am of the view that, had there not been sufficient encouragement from the court to counsel and parties, there would have been a significant delay in this case.

H **[45]** It may also be observed that both the issues canvassed in the appeal are somewhat academic, given that Mr Harmindar for the plaintiffs have indicated that he does not wish to pursue enforcement of the order of costs, and that the privileges and credentialing documents have been provided in compliance with the order of court. Counsel for the defendants have nonetheless found it fit to I continue their pursuit of the appeal. While I am of the view that this is entirely their prerogative, the question may be validly asked whether this was a justifiable expenditure of public resources. It is certainly a questionable use of judicial time.

Order accordingly.

Reported by Dzulqarnain Ab Fatar